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REPRESENTATION AND WARRANTY IN SALES.—HEILBUT *v.* BUCKLETON.

IN a previous number of this review [1] the writer criticized the well-known case of Derry *v.* Peek,[2] and pointed out the inconsistency between the English law relating to warranty and that governing liability for misrepresentation generally, in that an honest misrepresentation by a seller to induce the sale of goods was ground of liability, whereas, according to that decision, an honest misrepresentation made under other circumstances imposed no liability.

In a case recently decided by the House of Lords [3] the supposed inconsistency is denied. Express warranty is confined to the field of express contract, and it is said that no representation as such amounts to a warranty.

The case which so decided presented the following facts. The plaintiff inquired of the defendant whether his firm was bringing out a new rubber company. The defendant replied that they were, and the plaintiff then asked whether the company was all right. The defendant answered that his firm was bringing it out, to which the plaintiff rejoined that was good enough for him. The plaintiff was induced by this conversation to buy shares in the company, which proved a failure and the plaintiff lost his money. The jury

[1] 24 HARV. L. REV. 415. [2] 14 App. Cas. 337 [1889].
[3] Heilbut *v.* Buckleton, [1913] App. Cas. 30.

found that the company was not properly termed a rubber company, as it was engaged in other business as well as in raising rubber.

The Court of Appeal on these facts held the defendant liable as a warrantor of the truth of the statement that the company was a rubber company. The House of Lords, reversing this decision, held that there was no evidence proper to be submitted to the jury upon the question of warranty. Lord Haldane said:

"As neither the circumstances of the conversation nor its words were in dispute, I think that the question of warranty or representation was one purely of law, and that it ought not to have been submitted to the jury. . . . The words proved by the respondent were words which appear to me to have been words not of contract but of representation of fact. No doubt this representation formed part of the inducement to enter into the contract to take the shares which was made immediately afterwards, and was embodied in two letters dated the next day, April 15. But neither in these letters nor in the conversation itself are there words either expressing or, in my opinion, implying a special contract of warranty collateral to the main contract, which was one to procure allotment.

"It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it." [4]

The other Lords who delivered opinions made it equally clear that in their view no express warranty was possible unless the elements of a contract could be found. Lord Atkinson said:

"The question of Johnston's intention in making this affirmation remains. . . . The existence or non-existence of such an intention in the mind of the party making the affirmation, that his affirmation should be taken as a warranty of the truth of the fact affirmed, is, in an action of breach of warranty, no doubt a question for the decision of the jury which tries the action; and all the evidence in the case touching the knowledge, conduct, words, and actions of that party, from first to last, may be considered by them in arriving at a conclusion upon this question. In the present case it would appear to me that every relevant piece of evidence given, every fact proved, tends to disprove the existence of such an intention in Johnston's mind when this conversation took place, rather than to establish it." [5]

[4] [1913] App. Cas. 30, 36.

[5] [1913] App. Cas. 30, 43.

On page 44 the same judge said:

"But it would not be enough that Johnston should have offered to give a warranty as a term of the bargain to take these shares. The plaintiff should accept that offer and act upon it so as to make complete the collateral contract."

Lord Moulton said:

"Neither the plaintiff nor the defendants were asked any question or gave any evidence tending to shew the existence of any *animus contrahendi* other than as regards the main contracts. The whole case for the existence of a collateral contract therefore rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true and therefore to give a right to damages if such should not be the case." [6]

The only authorities on which the Lords rely to support their conclusion are the well-known case of Chandelor *v.* Lopus [7] and the *dictum* of Buller in Pasley *v.* Freeman, that "it was rightly held by Holt, J., cited in the subsequent cases, and has been adopted ever since, that an affirmation at the time of a sale is a warranty, provided that it appears on evidence to have been so intended." [8] In fact Lord Holt said nothing about intent in any of the reports of the cases cited by Buller, and Buller was too far removed in time from Holt to permit the supposition that he had any other knowledge of what Holt said than what the reports might give to him and equally give to us. The *dictum* of Buller, however, forms the basis of a positive assertion by Lord Moulton that Lord Holt regarded intent to warrant a material element. By this the court understands intent to contract, though if Lord Holt did make any such statement as that imputed to him he can hardly have meant intent to contract, since no action of assumpsit was ever brought

[6] [1913] App. Cas. 30, 48. [7] Cro. Jac. 4 [1603]. [8] 3 T. R. 51, 57 [1789].

on a warranty until long after Lord Holt's time.[9] Clearly anyone using the language in question in 1700 must have used it as meaning intent to affirm a fact as the basis of or inducement to a sale.

Moreover, if Holt did say what Buller imputed to him, and if Chandelor *v.* Lopus affords support to the decision of Heilbut *v.* Buckleton, it is a novel application of the doctrine of *stare decisis* to disregard the numerous decisions on the law of warranty during the past century, and hark back to a decision nearly three hundred years old and to a *dictum* pronounced over a century ago, before the law on the subject had been developed.[10] The writer has elsewhere endeavored to show that warranty by representation is not to be confined within the limits of the law of contracts, and that in so far as the seller's intent (of course meaning his apparent, not his actual intent) is an essential element of a warranty, it is only his intent to assert a fact in order to induce a sale, not his intent to enter into a contract. It is not necessary to repeat the argument, but it is worth while perhaps to show the inconsistency of the recent decision with what has heretofore passed as the law of England.

Lord Moulton is careful to point out in his opinion that he has "been dealing only with warranty or representation relating to a specific thing. This is wholly distinct from the question which arises when goods are sold by description and their answering to that description becomes a condition of the contract." [11] It is, of course, true that there is a marked distinction in the seller's obligations where he has contracted to sell by description, and where he sells specific goods. In the former case the seller's obligation by the very terms of his contract require him to fulfil the description as its meaning would be understood by a reasonable man.

Though the original basis of warranty was deceit and not contract, and though much confusion would be avoided if it were borne in mind that not only historically but analytically the scope of warranty in sales goes beyond the bounds of contract, it must be conceded that, at least on the English authorities, warranty is to be regarded as a contractual liability. But it cannot be admitted that prior to the recent decision of the House of Lords it was

[9] See 24 HARV. L. REV. 419-421.

[10] 24 HARV. L. REV. 419; Williston, Sales, § 201.

[11] [1913] App. Cas. 30, 51.

supposed that this contractual liability could only arise where an offer and acceptance of a promise could be found. A representation which induced a sale if it was not itself a warranty at least was evidence justifying the inference of a warranty. This can best be shown by an examination of the English decisions.

There is rather a surprising dearth of cases in the eighteenth century subsequent to the decisions at the beginning of that century by Lord Holt. In 1797, however, it was held in Jendwine *v.* Slade [12] that a description of two pictures in a catalogue as painted by certain artists did not afford evidence of a warranty. Forty years later in a case very similar in its facts in Power *v.* Barham,[13] the court held the case properly left to the jury under the instruction that if "the defendant had made a representation as part of his contract that the pictures were genuine, not using the name of Canaletti as matter of description merely, or as an expression of opinion upon something as to which both parties would exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's, the defendant was liable on a warranty." And Lord Denman said in his opinion in the court *in banc:* "It was therefore for the jury to say, under all the circumstances, what was the effect of the words and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion."

Williams, J., also said: "The words in question might be a mere expression of opinion, or might amount to a warranty: It was for the jury to say which they imported."

Between these two decisions there had been several others bearing upon the question. In Shepherd *v.* Kain,[14] in 1821, it appeared that an advertisement for the sale of a vessel described her as "copper fastened." The ship was only partially copper fastened, and Best, J., directed a verdict for the plaintiff, which was sustained by the upper court, though it was part of the contract that the ship should be taken "with all faults." The court construed these words to mean "all faults consistent with the advertisement." In Kain *v.* Old,[15] decided in 1824, a vessel was described as "copper bolted" in an instrument executed prior to the bill of sale of the vessel. It was held that the prior paper could not be regarded as

[12] 2 Esp. 572.
[13] Ad. & El. 473 [1836].
[14] 5 B. & Ald. 240.
[15] 2 B. & C. 627.

part of the contract; and if so intended would have been invalid because it did not recite the certificate of registry. Best, J., however, said, in regard to the statement, "If it be a mere representation, where is there a warranty to bind the vendor's executors?" [16] and Abbott, C. J.: "The description of copper bolted in the paper can therefore be considered as a representation only, and not as any part of the contract." [17]

In Salmon *v.* Ward,[18] a letter of the plaintiff stating "You will remember that you represented the horse to me as a five year old," and a reply from the defendant, "The horse is as I represented it," was held sufficient evidence to sustain a verdict for the plaintiff, Best, C. J., saying: "I quite agree that there is a difference between a warranty and a representation; because, a representation must be known to be wrong. . . . If a man says, this horse is sound, that is a warranty."

In Cave *v.* Coleman,[19] in 1828, a representation by a defendant that the plaintiff might "depend upon it that the horse is perfectly quiet, and free from vice," amounted to a warranty, Bayley, J., saying: "But that representation was that the horse was quiet, and free from vice, and being made in the course of dealing, and before the bargain was complete, it amounted to a warranty." [20]

In Wood *v.* Smith,[21] in 1829, a statement in regard to a horse by the seller, "I never warrant, but he is sound as far as I know," was held sufficient evidence to justify the jury's verdict for the plaintiff, Bayley, J., saying *in banc:* "The general rule is, that whatever a person represents at the time of a sale is a warranty." [22]

In Allan *v.* Lake,[23] in 1852, a specific lot of turnip seed was sold to the plaintiff under the description in a sold note, "Skirving's Swedes," and later another lot with the oral statement that it was "of the same stock" as the first. It was held that the description in the sold note amounted to a warranty that the seed was Skirving's Swedes, and that the statement at the subsequent sale was evidence of a similar warranty as to that lot. Coleridge, J., said:

"If it had been limited to an assertion that the seed was turnip seed, that would without doubt be a warranty of the seed being turnip seed.

[16] 2 B. & C. 630.
[17] Id. 634.
[18] 2 C. & P. 211 [1825].
[19] 3 M. & R. 2.
[20] Id. 3.
[21] 4 C. & P. 45, 5 M. & R. 124.
[22] Id. 46.
[23] 18 Q. B. 560.

And, in like manner, when the defendant described the seed as Skirving's, he undertook that it should answer that description." [24]

Erle, J., said:

"When a vendor gives a description of the properties of an article, it is a question for the jury whether such description is a mere commendation of the article, or a direct representation that he sells it as being the particular article described." [25]

In Hopkins *v.* Tanqueray,[26] in 1854, an assurance that a horse was "perfectly sound" made on the day prior to the sale of the horse at auction, was held not to amount to a warranty; and a rule absolute was entered to set aside a verdict for the plaintiff. Jervis, C. J., said:

"I think it is quite clear that what passed amounted to a representation only, and not to a warranty." [27]

Maule, J., said:

"There appears to have been no more than an honest representation that the horse in the defendant's opinion, and so far as his knowledge went, was a perfectly sound horse." [28]

Cresswell, J., said:

"If the representation made at the stable on the Sunday had been made at the time of the sale, so as to form part of the contract, it might have amounted to a warranty." [29]

and Crowder, J.,

"A representation, to constitute a warranty, must be shewn to have been intended to form part of the contract." [30]

In Carter *v.* Crick,[31] in 1859, a statement that a sample of barley was "seed barley" to which the buyer on examination agreed was held not to amount to a warranty. Channell, B., said:

"I do not mean to suggest, that where there is a representation of a distinct article by the seller, that might not amount to a warranty although the word 'warrant' was not used. . . . Each arrived at the conclusion, as a matter of opinion, and as a matter of opinion only, that the barley was seed barley." [32]

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[24] 18 Q. B 565. [25] Id. 566. [26] 15 C. B. 130.
[27] Id. 138. [28] Id. 140. [29] Id. 141.
[30] Id. 142 [31] 4 H. & N. 412. [32] Id. 416.

And Pollock, C. B., said:

"The utmost that took place was a representation that the barley was seed barley." [33]

In Stucley *v.* Baily,[34] certain representations contained in letters in regard to a yacht bought by the plaintiff of the defendant were held at the trial to amount to a warranty, and a verdict was directed for the plaintiff. A rule was made absolute for a new trial on the ground that the evidence should have been submitted to the jury. Pollock, C. B., said:

"If, at an interview before the correspondence, the plaintiff said to the defendant 'I want to buy your vessel,' and the defendant replied, 'very well; the price is so and so,' adding, 'she is sound,' but never intending to warrant her; that, though falling very far short of conclusive evidence, might be important as shewing the meaning of the transaction." [35]

Bramwell B., said:

"No doubt a representation made at the time of the contract may amount to a warranty. If a man, when he sells a horse, says it is sound, that is a matter of fact; and when he makes a positive statement of that kind, he undertakes that he knows the fact; and if it is not so, he tells an untruth. So, if he does not know the fact, he equally tells an untruth, and there is no reason why he should not be responsible. I should be more inclined to hold a person liable upon a representation as to a matter of fact of that kind than as to a matter out of his ordinary knowledge. For instance, suppose a man says a horse is sound, and it turns out that it has some defect which it was impossible that he could have known, I doubt whether his language ought to be interpreted as a warranty." [36]

In Cowdy *v.* Thomas [37] the plaintiff bought of the defendant a second-hand locomotive in regard to which the seller had written, among other things, "firebox and tubes are copper." The verdict was taken for the plaintiff with leave reserved to set the verdict aside. The verdict was, however, sustained. Kelly, C. B., said:

"'Firebox and tubes are copper.' To say that that answer was only the expression of the defendant's opinion, would be, I think, to disregard the plain ordinary and obvious meaning of the words used by both

[33] 4 H. & N. 417. [34] 1 H. & C. 405 [1862]. [35] Id. 414.
[36] Id. 419, 420. [37] 36 L. T. N. S. 22 [1877].

parties on the occasion. When to a plain and direct question the answer given is equally plain and direct, and perfectly unqualified, as it was in the present instance, it is impossible, in my opinion, to treat such an answer as amounting to less than a warranty." [38]

Huddleston, B., said:

"The real question here is whether or not there was (whether intended to be so or not by the vendor) a warranty by him, and whether it was received and acted on as such by the vendee. Now it is not necessary that the representation which is alleged to be a warranty should be simultaneous with the conclusion of the bargain; it is sufficient if it be made in the course of the negotiation, and enters into the bargain as finally made, and so that the bargain is made on the footing of it. . . . Taking all these facts into consideration, I am of opinion that there was in this case a representation made by the defendant with regard to this engine, and the material of which the tubes were composed, that was intended by him to be, and which was, acted on by the plaintiff." [39]

The cases just cited and the extracts quoted are all, or substantially all, the authorities on the point; selected for whatever light they may throw upon the question, whether favorable or unfavorable to the writer's contention.

It is evident from an examination of these extracts that there has been considerable confusion in regard to the use of the words *warranty* and *representation*. Doubtless the confusion has been greatly aggravated by the manifold meanings attached to the word warranty.[40] That a representation is the antithesis of warranty, as that word is used in the language of insurance and of charter-parties, is certain. It is natural that it should be hastily assumed that the same antithesis is used when warranty is spoken of in the law of sales; and this assumption is made in some of the extracts quoted, but generally it is made clear if a representation is spoken of as distinguished from a warranty, that what is meant by representation is an expression of opinion as distinguished from an assertion of fact. Only the expression of Crowder, J., in Hopkins *v.* Tanqueray [41] supports the idea that the seller must intend to contract that his representation is true in order to bind

[38] 36 L. T. N. S. 25 [1877].
[39] Id. 26.
[40] See Behn *v.* Burness, 3 B. & S. 751 [1863]. Anson on Contracts (12th ed.) 335n.
[41] See *supra*, p. 7.

himself as a warrantor. The expressions of the judges in the later case of Cowdy *v.* Thomas [42] strongly support the opposite view.

Even before the decision of this case, Benjamin, in his treatise on the law of sale, had summed up as follows the English law in regard to the intent to warrant requisite to make out a warranty:

"In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment." [43]

This statement, which appears in the first edition of Benjamin's work and in every subsequent edition, was adopted as an accurate statement of the law by the Court of Appeal in De Lassalle *v.* Guildford.[44] Unfortunately, the reporter failed to indicate by quotation marks, or otherwise, that the statement was a quotation from Benjamin, and in Heilbut *v.* Buckleton, Lord Moulton, apparently ignorant where the expression he was criticizing originated, selects it for criticism as a "serious deviation from the correct principle." [45]

The effect of a representation which induces a sale is shown not only by cases involving express representation, but by the whole law of implied warranty. It was not until after it became recognized that an express representation might be a warranty that the law of implied warranty was possible. The foundation for the law of implied warranty of title was laid when Lord Holt decided that a "bare affirmation" by one in possession that the goods sold are his own was sufficient to support on action.[46] It was then easy for the law to take the further step (which was not taken, however, until the nineteenth century), that any sale of chattels by one in possession carried with it an implied warranty of title unless the circumstances were such as to make it clear that the seller merely purported to sell such interest as he had or could convey.[47] The only basis for such a doctrine is that the seller necessarily represents by the mere proposal to sell that he has title.

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[42] See *supra*, pp. 8–9.
[43] Benjamin, Sale, (1st ed.) 454.
[44] [1901] 2 K. B. 215, 221.
[45] Heilbut *v.* Buckleton, [1913] A. C. 30, 50.
[46] Medina *v.* Stoughton, 1 Ld. Raym. 593, S. C.; 1 Salk. 210, 1795.
[47] See Eichholz *v.* Bannister, 17 C. B. N. S. 708 [1864].

The law of implied warranty of quality has had a similar history. It had become established by the early part of the nineteenth century, as already shown, that a representation of quality by a seller to induce a sale amounted to a warranty. In 1842 the first case was decided which clearly held that on the sale of a specific chattel a warranty of quality might be implied without any express promise or representation by the seller.[48] The case related to the sale of a specific barge which proved inadequate for the buyer's purpose of carrying cement. The court held that though there was no warranty that the barge was fit to carry cement, there was an implied warranty that the barge was reasonably fit for use as an ordinary barge. It is perfectly clear that the seller's contract was to sell the specific barge in regard to which the parties were negotiating. The only basis for imposing a liability as warrantor upon the seller is his implied representation that the specific thing which he seeks to sell is merchantable. It is impossible to analyze the situation so as to find a real promise of quality, either express or implied in fact. The obligation is one imposed by law, not by mutual assent, and the reason for imposing it is because the buyer is justified in believing that a manufacturer (or sometimes a dealer) by the very act of offering his goods for sale, asserts or represents that they are merchantable articles of their kind. The decision just referred to has been regarded as unquestioned law ever since it was decided. The same point is involved in a decision of the Court of Appeal in 1910.[49] In that case the plaintiffs had bought of the defendants "the 24/40 H. P. Fiat Omnibus . . . which we inspected." It was held that there was an implied obligation on the part of the seller that the omnibus should be of merchantable quality.[50] It will be seen that the parties here were dealing with regard to a specific omnibus which had been inspected by the buyer.

The case is in no way different when the buyer orders goods of a certain description, and the seller, without having entered into any previous contract binding him to furnish goods of the description requested, offers specific goods to the buyer which the latter accepts. It may be thought that such a bargain contains the elements

[48] Shepherd *v.* Pybus, 3 M. & G. 868 [1842].

[49] Fiat Motors, Limited, *v.* Bristol Tramways, etc. Co., L. R. [1910] 2 K. B. 831.

[50] See another case of implied warranty of specific goods in Irish *v.* Russell, L. R. Irish [1902] 2 K. B. 585.

of a contract by the seller that the goods shall fulfil the description, but on reflection it will be seen that this is not so. There is merely a representation implied in fact, though none the less real, that the goods produced and offered are of the kind requested. Whereupon, relying upon that representation, the buyer assents to become the owner of the specific goods produced.

A recent English case [51] of this sort affords an interesting comparison with the late decision of the House of Lords. In the earlier case the buyer of a rubber hot-water bottle, which broke when in use, sued the seller for breach of warranty and recovered. In that case the plaintiff asked for a rubber bottle. In Heilbut *v.* Buckleton the plaintiff asked for shares in a rubber company. In both cases, in response to a request for something which conformed to a given description, specific goods were produced and mutual assent to the sale of that specific thing followed. In neither case did the thing furnished justify the inferences naturally to be drawn from the description.

It should be observed that the sale of shares is not a sale of goods within the meaning of the English Sale of Goods Act, but there is no reason to suppose that express warranties of choses in action and of goods are to be differently defined. Certainly there is nothing in the language of the opinions in Heilbut *v.* Buckleton to suggest a difference. On the contrary, the reasoning and authorities cited in that case indicate that the court regarded the decision as involving the definition of express warranty in the sale of goods.

An interesting case to compare with Heilbut *v.* Buckleton is Starkey *v.* Bank of England,[52] decided by the House of Lords only ten years ago. In that case the defendant, a stockbroker, presented on behalf of a customer in good faith to the Bank of England a power of attorney, which purported to be signed by the owner of certain consols. On the faith of this power of attorney the bank transferred the consols to a third person. One of the signatures to the power of attorney was forged, and the bank, being liable to the original owner of the consols for making the transfer, sued the stockbroker. Recovery was allowed on the ground that since the bank acted "on the representation that the agent had the authority of the principal, that does import an obligation — the contract being

[51] Preist *v.* Last [1903] 2 K. B. 148 C. A. See also Allan *v.* Lake, *supra*, p. 6.

[52] [1903] App. Cas. 114.

for good consideration — an undertaking on the part of the agent that the thing which he represented to be genuine was genuine. That contains every element of warranty." [53] In other words, the doctrine that the representation express or implied of an agent that he has authority to act amounts to a warranty is accepted by the House of Lords, but the much older and more firmly established doctrine that a representation by a seller inducing the sale of goods amounts to a warranty is now denied.[54] That good old doctrine for the encouragement of trade, known as *caveat emptor*, has received no such support for many years.

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[53] [1903] App. Cas. 118, per Lord Halsbury.

[54] It is interesting to note that this doctrine of agency is barely half a century old, having been first established by Collen *v.* Wright, 7 E. & B. 301, 8 E. & B. 647 [1857].